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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Respondent.

Petition Writ of *Certiorari* to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. Should this Court's supervisory powers be exercised to correct the failure of a court of appeals to adhere to the law of the case doctrine, wherein it reversed its prior ruling on a case determinative issue, thereby requiring relitigation of the issue in multiple trials?

II. Do the fundamental principles of maritime law permit courts in salvage cases to divest intervening owners of all indicia of ownership in order to satisfy a salvage lien solely because the value of the property is enormous?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Atlantic Mutual Insurance Company, Salvage Association, London Assurance, Alliance Assurance Company, Ltd., Royal Exchange Assurance, Indemnity Marine Assurance Company, Ltd., Marine Insurance Company, Ltd., and the Superintendent of Insurance of the State of New York (collectively referred to as the "Underwriters") and the respondent, Columbus-America Discovery Group, Inc. ("CADG") and Jack F. Grimm and Joanne Lampe Charlton, Personal Representative of the Estate of Harry G. John, who were appellants in the court below.

Pursuant to Rule 29.1 of the Rules of the United States Supreme Court, the Court is advised that the following petitioners do not have any parent companies or any subsidiaries that are not wholly-owned:

Atlantic Mutual Insurance Company

Salvage Association

Superintendent of Insurance of the State of New York

The following are parent or subsidiary companies (not wholly owned) of the remaining petitioners:

- The London Assurance - Sun Alliance Group plc (parent), Protea Assurance Company Limited (subsidiary)
- Alliance Assurance Company, Ltd. - Sun Alliance Group plc (parent)
- Indemnity Marine Insurance, Ltd. - Commercial Union plc (parent)
- Royal Exchange Assurance - Guardian Royal Exchange Assurance plc (parent)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated June 14, 1995, is reported as

Columbus-America Discovery Group v. Atlantic Mutual Insurance Co., 56 F.3d 556 (4th Cir. 1995)(hereinafter "CADG II"), and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States District Court for the Eastern District of Virginia dated November 18, 1993, is unreported and is reproduced at Pet. App. 74a. The Order entered January 13, 1994 approving the Marketing Plan is not published and is reproduced at Pet. App. 203a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated July 11, 1995, is not published and is reproduced at Pet. App. 402a.

The first opinion of the United States Court of Appeals for the Fourth Circuit dated August 26, 1992, is reported as *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 123 L.Ed. 2d 183, 113 S.Ct. 1625 (1993) (hereinafter "CADG I") and is reproduced at Pet. App. 217a. The order

of the Supreme Court of the United States of America denying the respondent's Petition for Writ of *Certiorari* dated March 22, 1993 is not published and is reproduced at Pet. App. 399a.

The first opinion of the United States District Court for the Eastern District of Virginia dated August 14, 1990, is reported as *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va. 1990) *rev'd, in part, remanded, sub nom. Columbus-America Discovery Group v. Atlantic Mutual Ins. Co. et al.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 123 L.Ed. 2d 183, 113 S.Ct. 1625 (1993) and is reproduced at Pet. App. 322a. The Order of the United States Court of Appeals for the Fourth Circuit denying the Motion for Clarification dated April 4, 1994 is not published and is reproduced at Pet. App. 398a. The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated October 15,

1992 is not published and is reproduced at Pet. App. 404a.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1995. Pet. App. 1a. The court of appeals denied a timely Petition for Rehearing on July 11, 1995. Pet. App. 402a. The jurisdiction of the district court was based upon the maritime and admiralty jurisdiction established in 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

Supplemental Admiralty Rule C to the Federal Rules of Civil Procedure is set forth verbatim at Pet. App. 412a.

Supplemental Admiralty Rule E(9)(c) to the Federal Rules of Civil Procedure provides:

> All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

STATEMENT OF THE CASE

This case was filed as an *in rem* action under Supplemental Admiralty Rule C to enforce a maritime lien for salvage against the S.S. CENTRAL AMERICA and its cargo. The vessel sank in a hurricane in 1857, carrying a large commercial shipment of gold. In 1989, the salvor, Columbus-America Discovery Group (hereinafter "CADG"), gave notice of this action to some of the insurers of the

commercial shipment of gold. The insurers (hereinafter "Underwriters") promptly filed claims in the proceeding. The trial court bifurcated the proceedings: first to determine whether to apply the law of salvage or the law of finds and, second, to conduct a trial to determine an appropriate salvage award, in the event that salvage law applied.

In the first trial, Underwriters produced corporate documents, public records and other evidence proving that they insured the commercial shipment of gold, that they had paid claims, and thus became the owners of the gold worth $1,219,189 (1857 value). Pet. App. 264-66a. The district court found that the Underwriters had abandoned their interests, and awarded title of the commercial shipment of gold to CADG under the law of finds. Pet. App. 395-96a. The United States Court of Appeals for the Fourth Circuit affirmed the finding that the Underwriters had insured, paid claims on and became the owners of the commercial shipment of gold. Pet. App. 266a. The court, however,

reversed the district court's ruling that the Underwriters had abandoned their ownership interest and determined that the law of salvage, rather than the law of finds was appropriate and remanded the case to the district court to determine a proper salvage award and directed the lower court on remand to determine the *percentage* to which each underwriter was entitled. Pet. App. 274a.

On remand, the district court conducted a trial to determine an appropriate salvage award. A stipulation of the Underwriters was admitted into evidence which set out the percentage of the shipment of gold that each underwriter had insured. The district court awarded 90% of the recovered gold (Pet. App. 202a) and all of the silver aboard the CENTRAL AMERICA to CADG. Pet. App. 183a. Over objection by the Underwriters, the district court approved a marketing plan submitted by CADG which made CADG the "Central Authority" with sole control over marketing and sales of all of the recovered *res*. Pet. App. 205a.

On appeal of the second district court decision, the Fourth Circuit affirmed all of the district court's rulings in its second opinion and remanded the case for a determination of the *amount* each underwriter insured, requiring each underwriter to prove its ownership in the *res*. Pet. App. 16-17a.

REASONS FOR GRANTING THE WRIT

Ownership of the most valuable treasure in cargo history is the central issue in this litigation. It is an issue so basic, yet so crucial to this case, and other salvage cases which will follow, that it must be considered by this Honorable Court. The opinion below departs from fundamental principles of salvage law, creates a conflict among the courts of appeals on salvage awards and raises the issue of this Court's supervisory powers to enforce the law of the case doctrine.

The facts of this case are rather simple and typical of

salvage cases. CADG recovered the gold cargo aboard the S.S. CENTRAL AMERICA from the ocean floor and brought it before the United States District Court for the Eastern District of Virginia to assert its salvage lien pursuant to Supplemental Admiralty Rule C. In response to the salvor's Notice of Arrest, the Underwriters asserted their ownership interest in the cargo based upon claims paid at the time of the loss in 1857. The only unique factor in this case is the nature of the salved property. The gold cargo of bullion and coins was valued at approximately $1,200,000.00 in 1857. Today the property may be worth one hundred times this amount or more.

The Fourth Circuit's affirmance of a salvage award as a percentage of the proceeds of the sale of the *res*, without establishing a value of the salvage services, conflicts with the positions of the Fifth Circuit and the Eleventh Circuit as to proper salvage awards. Furthermore, the Fourth Circuit, by affirming the trial court's rulings that the Underwriters'

property must be sold to determine the amount of the salvage lien and that the marketing and sale of the Underwriters' property may be controlled and conducted exclusively by the salvor as "Central Authority," has divested the owners of all rights to the property in favor of the salvor. Although the Fourth Circuit refused to grant the salvor title to the treasure pursuant to the law of finds, the terms of the salvage award and judicial sale affirmed by the court have the same effect. Such a significant departure from traditional salvage law and admiralty rules should only occur at the approval of this Honorable Court.

This Court should grant the writ of *certiorari* because a failure to review the opinion below will result in the opinion remaining as binding precedent in the Fourth Circuit, which conflicts with precedent in other circuits. Based upon the opinion below, owners of lost property at sea will be deprived of all indicia of ownership, including the right to retain title to property in excess of the value of the salvage

award, the right to a specified salvage award determined by the court and the right to a proper judicial sale. The effect of these rulings has already become apparent, as treasure salvors continue to bring property within the jurisdiction of the Fourth Circuit, including the alleged salvors of the R.M.S. TITANIC,[1] and the R.M.S. LUSITANIA.[2] In order to promote fairness and uniformity in salvage cases and resolve a conflict which now exists in the various courts of appeals, it is necessary to correct the Fourth Circuit's failure to follow established principles of salvage law.

The Court should also use its supervisory powers to correct the Fourth Circuit's failure to adhere to the law of the case doctrine. Although the court claimed to have "clarified" its ruling in CADG I, the opinion below is a reversal of its

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[1] *Marex Titanic, Inc. and Titanic Ventures v. The Wrecked and Abandoned Vessel, Its Engines, Etc. Believed To Be The R.M.S. TITANIC*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd* 2 F.3d 544 (4th Cir. 1993).

[2] *F. Gregg Bemis, Jr. v. R.M.S. LUSITANIA*, 1995 AMC 1665 (E.D. Va. 1995).

prior ruling that the Underwriters paid the claims upon and became the owners of the commercial shipment of gold aboard the CENTRAL AMERICA. This extremely exhausting and expensive litigation has been needlessly prolonged by the court's reversal on this key ruling.[3] The

---

[3] The result to the Underwriters, which expended vast resources in the second proceeding in reliance on the first court of appeals decision, is beyond measure. The district court judge remarked that:

> more than two thousand pages of testimony was presented in the second trial together with numerous depositions, video tapes and some thousand exhibits. Counsel have filed extensive briefs and expended a full day in final oral argument.
>
> To give some idea of the amount of time and energy expended by the parties in an effort to establish their respective claims, briefs filed herein set forth that some 78 days were spent in taking depositions, 32 days before the 1990 trial and 46 days before the 1993 trial, transcribed into more than 11,400 pages. In fact, depositions and trial testimony of Thompson exceeds 2,400 pages. More than 40 bankers's boxes of documents were produced by plaintiff. A total of some 18 days were required for the 1990 and 1993 trials with some 4,000 pages of testimony.

Pet. App. 77-78a.

opinion below will result in relitigation in a third trial of an issue which has been fully litigated in two previous trials and conclusively determined by the Fourth Circuit in CADG I. This Court should summarily reverse the opinion below, or in the alternative, grant the Underwriters' petition for a writ of *certiorari* on this issue.

I. THE FOURTH CIRCUIT'S OPINION SHOULD BE CORRECTED BECAUSE IT FAILED TO FOLLOW THE LAW OF THE CASE ESTABLISHED IN ITS PRIOR OPINION WHICH HELD THAT THE UNDERWRITERS HAD ESTABLISHED THEIR OWNERSHIP INTERESTS IN THE COMMERCIAL SHIPMENT OF GOLD ABOARD THE S.S. CENTRAL AMERICA AND NO EXTRAORDINARY CIRCUMSTANCES EXISTED TO WARRANT SUCH FAILURE.

> No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered unless for clerical mistakes...

Ex parte Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492 (1838).

A. The opinion below was a reversal of the court's prior decision and is a departure from the law of the case.

There is no question that the Fourth Circuit in CADG II reversed its ruling in CADG I that the Underwriters paid the claims and became the owners of the commercial shipment of gold. Pet. App. 266a. In CADG I, the court also remanded the case to determine the salvage award and the

percentage of the shipment of gold which each underwriter insured. Pet. App. 274-75a. The rulings and instructions on remand in the opinion below, CADG II, however, now require the Underwriters, individually, to prove ownership of the commercial shipment of gold, which will require introduction of the same evidence by Underwriters and rebuttal evidence by CADG in a third trial which was already introduced in the first two trials. Pet. App. 17a. This is clearly a departure from the law of the case established in CADG I.

In the first trial conducted in 1990, the district court held, *inter alia*, that the Underwriters had abandoned their ownership interests in the gold cargo. The court, therefore, applied the law of finds, declaring that CADG became the sole owner of the gold. Pet. App. 395-96a. The Fourth Circuit in CADG I, affirmed the ruling that the Underwriters were the owners of the gold (Pet. App. 266a), reversed the ruling on abandonment and ruled that the law of salvage,

rather than the law of finds was applicable. Pet. App. 274a.

In CADG I, the Fourth Circuit clearly ruled that the Underwriters were the owners of the gold. The court described in great detail the evidence which the Underwriters presented at trial to prove their ownership interests and acknowledged that:

> [o]n appeal, Columbus-America exerts much effort in asserting that there exists insufficient evidence to prove that the underwriters who are now parties in this litigation actually insured and paid off claims upon the gold.

Pet. App. 265a. In response to this allegation and appeal point, the Fourth Circuit held that:

> [s]till, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, *paid off claims upon and became the owners of the commercial shipment of gold in 1857.*

Pet. App. 266a. (emphasis added). The court explained further by stating that:

> [s]hould Columbus-America be able to prove, for example from a location on the ocean floor inconsistent with the bulk of the treasure, that certain gold was, more likely than not, passenger

> gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. *Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.*

Pet. App. 264a n. 6 (emphasis added).

It is clear that in CADG I, the Fourth Circuit made distinct legal determinations relating to ownership of the commercial shipment. These determinations included a ruling that $1,219,189 of the commercial shipment of gold was insured, and that the Underwriters which were parties to this litigation had indeed paid claims and had become owners of that commercial shipment of gold. Based upon these findings, the Fourth Circuit set forth the following mandate:

> [o]n remand, the district court is to apply the law of salvage, and in so doing it must determine what *percentage* of the gold each underwriter insured. Equally, if not more, important, the Court must also determine the proper salvage award for Columbus-America.

Pet. App. 274-75a. (emphasis added). It is clear that the law of the case was that the Underwriters, collectively as a party, were found to have insured, paid claims upon and become

the owners of the commercial shipment of gold and that on remand, the district court was merely to determine the *percentage* of that commercial shipment which each underwriter insured.

Despite the many rulings in CADG I that ownership had been established, on the second appeal to the Fourth Circuit in CADG II, CADG again asserted that the Underwriters had not proven an ownership interest in the commercial shipment of gold. Pet. App. 16a. Although in CADG II, the Fourth Circuit stated that it clarified its prior ruling relating to ownership of the commercial shipment of gold (Pet. App. 71a), it is clear that such ruling is a reversal. In CADG II, the Fourth Circuit reversed its prior opinion by stating that the previous opinion should not be read to hold that a *prima facie* showing is all that is required of the Underwriters to prove their claims. Pet. App. 71a. The court further stated that "a claimant cannot prove his or her claim merely by filing a lawsuit." Pet. App. 71a. The court then issued the

following mandate and instructions on remand:

> [t]he district court must, therefore, *consider each underwriter's admissible evidence of the validity of its claim to a portion of the gold salvaged from the CENTRAL AMERICA. Columbus-America is entitled to introduce admissible evidence, if any, to rebut these claims... If the total amount of gold proved owned by the underwriters constitutes less than one hundred percent of the gold salvaged* -- either because the proof of ownership fails with regard to one or more underwriters, or because a significant portion of uninsured gold is recovered, or for any other reason -- Columbus-America may retain the excess.

Pet. App. 71-72a. (emphasis added).

This remand instruction is contrary to the court's ruling in CADG I that a *prima facie* showing of ownership had been made. "*Prima facie* case" is defined as "[s]uch as will prevail until contradicted and overcome by other evidence." BLACK'S LAW DICTIONARY 1189-90 (6th ed. 1990) *"Prima facie* evidence" is defined as "[e]vidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if

not rebutted or contradicted, will remain sufficient." *Id.* at 1190. Because a *prima facie* showing was made in CADG I, Underwriters clearly have produced evidence of ownership and should not in a third trial be required to present evidence to prove ownership again. CADG, in two previous trials, introduced evidence to rebut the ownership of the Underwriters.

It is significant that the instructions on remand are quite different in CADG I from those in CADG II.[4] In CADG I, after the Underwriters were declared to be the owners, the court instructed the district court on remand merely to

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[4] In CADG I, the Fourth Circuit instructed the district court:

> [s]hould Columbus-America be able to prove, for example, . . . that certain gold was, more likely than not, passenger gold, rather than part of the insured shipment, this gold should be awarded to Columbus-America in its entirety. Also, should more than $1,219,189 (1857 valuation) of gold be rescued, Columbus-America should be found the owner of any surplus.

Pet. App. 264a, n. 6.

determine what *percentage* of the entire commercial shipment each underwriter insured. Pet. App. 274a. Whereas, in CADG II, the court instructed the district court to consider evidence as to whether each underwriter can prove its ownership. Pet. App. 17a. In so doing, it is apparent that the Fourth Circuit reversed its prior opinion and potentially rendered the salvage trial a nullity.

Although the court attempts to cloak its turnabout as a "clarification," it was truly a reversal of its prior decision. In CADG II, the Fourth Circuit, with the exception of the ruling on abandonment, adopted the dissenting opinion of Judge Widener in CADG I. This shift, under the guise of "clarification," is impermissible. Despite the assertions of the Fourth Circuit, its opinion in CADG II is a direct reversal of its mandate in CADG I and thereby violates the law of the case doctrine.

B. **The Fourth Circuit was required to follow its ruling in CADG I that the Underwriters were the owners of the commercial shipment of gold which was the law of the case.**

This Court has explained that under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (*dictum*). *See also Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1987), *cert. denied*, 493 U.S. 822 (1989). The findings and rulings by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal. *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678 (11th Cir. 1984). Once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case (*Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991)), including those by the appellate court which rendered the first decision. *See Knotts v. United States*, 893 F.2d 758,

761 (5th Cir. 1990). In *United States v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991), the court stated that:

> [w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand. If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.

(emphasis in original) (citation omitted).

The Fourth Circuit in CADG I, explicitly affirmed a finding by the district court that the Underwriters collectively had established that they owned the commercial shipment of gold.[5] The court also decided that the insured shipment was worth $1,219,189 (1857 valuation). Any variation from these findings in subsequent opinions by the Fourth Circuit in this

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[5] The Fourth Circuit stated:

> [s]till, we find that the district court did not err when it held that the underwriters who are now parties, or their predecessors in interests, *paid off claims upon and became owners of the commercial shipment of gold in 1857.*

Pet. App. 266a. (emphasis added).

case is a departure from the law of the case.

There was no reason for the Fourth Circuit to fail to adhere to its decision in CADG I. "The litany of exceptional circumstances sufficient to sidetrack the law of the case is not only short, but narrowly cabined." *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991). Three reasons have been articulated for deviating from the law of the case. First, if a decision of the United States Supreme Court, directly in point, irreconcilable with the decision on the first appeal, was published between subsequent appeals, the decision of the Supreme Court must be followed despite the doctrine of the law of the case. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). Second, the law of the case has been held to have no application where, in the interval between the two appeals, there has been a change in the law, by legislative enaction or judicial ruling. *Seattle v. Puget Sound Power & Light Co.*, 15 F.2d 794 (9th Cir.1926), *cert. denied*, 273 U.S. 752 (1927). Finally, absent

the first two criteria, the appellate court may reverse its previous decision *only* when such decision was clearly erroneous *and* works a manifest injustice. *Chicago, St. Paul, M & O Ry. Co. v. Kulp*, 102 F.2d 352 (8th Cir.), *cert. denied*, 307 U.S. 636 (1939).

"[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). Absent an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error and prevent manifest injustice, holdings of the appellate courts shall not be relitigated. *Doe v. New York City Department of Social Services*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). As discussed more fully in Section I.C., *infra*, none of these circumstances exist which warrant the court's departure from the law of the case.

The Fourth Circuit should be required to follow its prior

ruling in CADG I so that the parties need not relitigate the ownership issue, which has been conclusively decided. This Court has stated that the law of the case doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. at 816 (quoting 1B J. MOORE, J. LUCAS, & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.404[1], p. 118 (1984)). *See also Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989) (the law of the case "is a rule based on sound public policy that litigation should come to an end,... and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided."). This Court has stated that:

> [t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Arizona v. California, 460 U.S. 605, 619 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-154 (1979)). Clearly, the issue of ownership was fully litigated in the first trial, decided by the trial court and affirmed by the court of appeals. A third trial to determine this issue is unnecessary, vexatious, will destroy reliance on judicial action and will most certainly result in a third appeal.

In *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) the Eleventh Circuit stated that:

> [t]he law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality and obedience within the judicial system. . . . Due process, as a constitutional value, may be the cornerstone, but finality and stability, as institutional values, may be of equal importance. While the law of the case doctrine is not an "inexorable command,"... adherence to it helps to ensure that the essential elements are maintained in the process. Failure to honor its commands can only result in chaos.

(footnotes and citations omitted). The failure of the Fourth Circuit to adhere to the law of the case is a denial of due

process and will result in chaos.

C. No exceptional circumstances existed to warrant the Fourth Circuit's departure from the law of the case.

The decision on a question presented in an appeal is the law of the case and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works a manifest injustice. *Chicago, St. Paul, M & O Ry. Co. v. Kulp*, 102 F.2d 352 (8th Cir.), *cert. denied*, 307 U.S. 636 (1939). The Fourth Circuit's determination that the Underwriters were the owners of $1,219,189 worth of gold cargo was not clearly erroneous.

Even if the court determined that it misunderstood or overstated the district court's findings on ownership, the ruling in CADG I must stand as it was not clearly erroneous. This is particularly so where, as here, the evidence which was introduced by both parties in the first trial on the ownership

issue supports the ruling. The court reviewed the trial evidence and listed several documents which contained evidence of ownership. Included in this list were underwriter disaster books, Board resolutions to pay claims, minutes of board meetings, studies prepared by the New York Board of Underwriters, salvage contracts and newspaper reports. Pet. App. 281-82a.

In addition, CADG put the issue of ownership squarely before the Fourth Circuit in CADG I. The Fourth Circuit acknowledged that CADG asserted that insufficient evidence existed to prove that the Underwriters actually insured and paid off claims on the gold. Pet. App. 265a. In response to this assertion, the court recounted the varied testimony and documents admitted at trial in support of ownership and concluded by determining that the trial court did not err in its necessary finding that "the underwriters paid off claims upon and became the owners of the commercial shipment of gold in 1857." Pet. App. 266a. This finding was far from

"clearly erroneous", as the evidence clearly proved that these Underwriters were, indeed, the subrogated owners of the gold cargo.

Furthermore, the court chose not to revisit the opinion in response to CADG's petition for rehearing in which the issue of ownership was squarely addressed by CADG. Pet. App. 404a. In addition, CADG filed a Motion for Clarification with the Fourth Circuit after the second district court opinion, seeking a clarification of the ownership issue and requesting that the court remand the matter to the district court to determine the amount of gold each underwriter insured. The court denied the motion, finding that it lacked merit. Pet. App. 398a.

In describing "clearly erroneous," the Seventh Circuit opined that this standard was "more than just maybe or probably wrong; it must strike us as wrong with the force of a five-week-old, unrefrigerated dead fish... the...decision must be dead wrong..." *Parts & Electric Motors, Inc. v. Sterling*

Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989); *see also City Public Service Board v. General Electric Co.*, 935 F.2d 78, 82 (5th Cir. 1991); *Reid v. Rolling Fork Public Utility District*, 979 F.2d 1084 (5th Cir. 1992). The majority's opinion in CADG I was far from dead wrong, but rather, was supported by the evidence.

Furthermore, the decision did not result in a manifest injustice. The Fourth Circuit's mandate in CADG I resulted in a trial court judgment which awarded 90% of the recovered gold cargo to CADG in the salvage trial. It is rare indeed when a judgment which awards a plaintiff 90% of its claim could be deemed manifestly unjust. In fact, this judgment will surely result in the largest salvage award in recorded history.

It is manifestly unjust, however, to the Underwriters, each of which did its part to replace the value of the lost gold aboard the CENTRAL AMERICA, and thereby minimize the

impact of the Panic of 1857, that they be required to endure three trials, and likely three appeals, merely to establish that the claims they paid to avert economic catastrophe were actually made. Because this threshold issue was already established as the law of the case in CADG I, it must be upheld. In reliance on this ruling, the Underwriters expended enormous resources on the salvage trial, which may be rendered a nullity by the opinion below.

II. THE OPINION BELOW SUBSTANTIALLY DEVIATES FROM ESTABLISHED SALVAGE LAW PRINCIPLES REGARDING OWNERSHIP OF THE *RES*, DETERMINATION OF THE SALVAGE AWARD AND SALE OF THE *RES*.

> When property has been sunk at sea or lies wrecked near the shore the owner has not been divested of title by virtue of that fact. And neither does the salvor gain title by finding it. It is his obligation to bring the salved property before an admiralty court (unless amicable agreement is reached with the owner) where the owner will be given an opportunity to come in and claim the property. The salvor by bringing his salvage complaint and by having the recovered property arrested by the marshal, is enabled to take the necessary steps for securing his reward. Thereafter, (particularly if the

> owner fails to appear and claim his property, or make suitable arrangements for the salvor's compensation) the property can be sold by the marshal on order of the court. The proceeds of the sale is placed in the registry of the court (after deduction of legal expenses and fees) for distribution to the salvor and the owner of the salved property.

3A BENEDICT ON ADMIRALTY § 150.

A. The salvage award violates the principles of salvage law because it awards a portion of the salved property to the salvor and because it fails to establish a precise dollar amount for the salvage award.

The trial court's failure to establish a salvage award in a precise amount deprived the Underwriters of their ownership rights, contrary to the traditional law of salvage. The Fourth Circuit's mandate in CADG I remanded the case to the trial court to determine a salvage award. Following the second trial, the court made the following salvage award:

> [o]f more importance is the revelation that the quantity of the gold insured is only $1,219,189, of a bullion value today of some $21 million and even if marketed at substantial times its bullion value, it would not permit an adequate or liberal award. What a pity it did not

> amount to a billion dollars so that a proper award could have been given. Under all the facts and circumstances, the salvors are awarded ninety (90) percent of the salvaged gold and Underwriters awarded ten (10) percent.

Pet. App. 201-02a.

This ruling by the trial court, and affirmed by the Fourth Circuit in CADG II, significantly deviates from salvage principles. The most glaring deviation is found in the final sentence where the trial judge awards to the salvor "ninety (90) percent of the salvaged gold." Bound by the Fourth Circuit's ruling in CADG I that the gold was not abandoned, the judge, pursuant to existing law, had no authority to award the gold to the salvor. This statement reveals a significant departure from salvage law, under which the salvor is not entitled to be awarded any portion of the gold. In addition, by framing the salvage award as a right to the gold, the court failed to establish a dollar value for the services rendered, which values the maritime lien. By failing to establish a specific salvage award, the owner of the salved property is

prevented from paying the amount of the lien and thereby avoid judicial sale of the *res*.

The Fourth Circuit's decision is in conflict with the Fifth and Eleventh Circuit's position on salvage awards. In *Platoro Ltd., Inc. v. Unidentified Remains*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), the trial court did not establish a discrete salvage award, but instead, held that the salvor of sunken treasure was entitled to a salvage award at least equal to the value of the *res*. The trial court ordered the substitute custodian, the State of Texas, to surrender the *res* to the salvor or have it sold by the court with the entire proceeds being paid to the salvor. *Id.* at 902. The Fifth Circuit reversed the trial court's finding, stating:

> [w]e cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars, except where the salvage award was made alternatively with an award of the title to the *res* under the law of finds. In this case, where Texas has a strong interest in keeping the *res* because of its historical significance to the State, it is particularly inequitable to compel its sale at this juncture.

On remand, the district court should establish a

> dollar value for the *res* as recovered, and use that in its consideration of the factors on which a salvage award is based. The court should arrive at a dollar figure for the total value of the salvage services rendered, which should not exceed the value of the *res*.

Id. at 903-04 (citations omitted).

Soon after the decision in *Platoro*, the trial court in *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985), was faced with a treasure salvage case where the salvor was seeking title to the *res*. The trial court held that only under the law of finds may title to the *res* be granted. *Id.* at 808. The court opined that it would be violative of underlying salvage law principles to award title to the *res* because salvage law assumes that title to the personalty remains in the owner. Therefore, the trial court declined to award the *res in specie*. *Id.* at 808.

The foundation of salvage law requires that the salvors are acting to return property to its owners, not to return it for the salvors' use and benefit. In *The Joseph Stewart*, 1

Crabbe 218, 22 F. Cas. 582, 583 Case No. 13,070, (E.D. Pa. 1838) the court stated:

> [t]he difficulty in this case arises, not in estimating the nature and value of the service, nor in ascertaining * * * a rule of proportion for the reward of such a service. * * * Here the fund is so small that the whole of it, distributed among these 13 salvors, could hardly be considered an extravagant reward for their services. Yet we have no authority to treat this as a derelict. * * * Indeed, the libelants claim as salvors, not as finders of property which had no owner; they ask for salvage, for a reward out of the property saved, for their services in saving it. The very nature of this claim is a demand on the owner, for a reasonable compensation, for the service rendered to him in rescuing his property from total loss; but if the salvors are to take all, the loss would be as total, to the owner, as if his property had been swallowed up by the sea. It would be manifestly absurd to call upon the owner with such a demand, to restore him no part of the property saved, but to tell him they must have all for saving the rest.

The Fourth Circuit has completely denied the Underwriters the possession and control over property which lawfully is owned by the Underwriters. The sale of the *res*, through the court-approved marketing plan, is only necessary because a precise salvage award was not determined in this

litigation. After a search of hundreds of salvage cases, these petitioners have uncovered not a single case where a salvage award was based on the percentage of the proceeds of a judicial sale which had not occurred before the award or did not involve abandoned property. 3A BENEDICT ON ADMIRALTY App. D. (documenting American salvage cases from the Eighteenth Century to present). The Fourth Circuit's affirmance of the salvage award in this case is not only a radical departure from traditional salvage law, but also conflicts with the positions of the Fifth and Eleventh Circuits.

B. The affirmance of a marketing plan which provides the salvor the sole and exclusive right to market and sell the *res* is contrary to fundamental principles of salvage law and Supplemental Admiralty Rules.

The Fourth Circuit affirmed a marketing plan which allowed the salvor to maintain exclusive possession and control over the gold recovered from the CENTRAL AMERICA and authorized the salvor as the sole marketing

agent of the gold. Pet. App. 203-205a. This ruling, which has the effect of transferring title to the salvor, deviates from the very foundations of salvage law. Absent a finding of abandonment, the title to salved property remains with the true owner. There are well settled principles of salvage law which specify the rights of the parties and distribution of the *res*:

> [w]hen property has been sunk at sea or lies wrecked near the shore the owner has not been divested of title by virtue of that fact. And neither does the salvor gain title by finding it. . . . Thereafter, (particularly if the owner fails to appear and claim his property, or make suitable arrangements for the salvor's compensation) the property can be sold by the marshal on order of the court. The proceeds of the sale is placed in the registry of the court (after deduction of legal expenses and fees) for distribution to the salvor and the owner of the salved property.
>
> The salvor can purchase the property at the sale, if he so wishes, and can acquire title like any other purchaser in good faith.

3A BENEDICT ON ADMIRALTY § 150. The Fourth Circuit, however, made it clear that it departed from these principles because of the value of the *res*, by stating that:

> [t]he difficulty in this case, however, is that there is just too much gold involved to allow more than one party to market it. The loss of the gold aboard the CENTRAL AMERICA significantly affected the precious metal and financial markets in 1857, and there is evidence that the gold's recovery could, upon its re-entry into the market, have a significant effect today.

Pet. App. 65a.

Furthermore, the Fourth Circuit's opinion in CADG II reveals a complete reconstruction of salvage law. The court stated that:

> [t]o the extent that Columbus-America's designation as the central marketing authority for all of the gold appears to unduly interfere with the underwriters' ownership rights, it must be remembered that separate marketing of the gold would be less efficient and inevitably result in a lower total return. Thus, Columbus-America would be left with nine-tenths of a smaller pie, to the detriment of *their* eventual ownership rights.

Pet. App. 66a, n. 24. (emphasis in original). This rationale clearly shows how a departure from traditional salvage procedures can result in total divestiture of the rights of ownership. Applying existing salvage law, CADG should *not* acquire an ownership interest in any portion of the *res* at any

time during this action. Ownership of the cargo remains with the Underwriters until it is sold at a judicial sale, at which time ownership rights will be transferred to the purchaser. Therefore, under existing law, CADG has no "eventual ownership rights" which can be diminished by the marketing of the *res*. CADG is entitled to be paid a proper award for salvage services, and the law does not require that the *res* be liquidated to satisfy that award unless the property owner is unable to pay the award otherwise.[6]

Furthermore, the procedure affirmed by the court permits the salvor to essentially engage in a private sale of the *res* without the consent of the owners, in violation of Supplemental Admiralty Rule E(9)(c), which provides as follows:

> [a]ll sales of property shall be made by the marshal or a deputy marshal, or by other person or

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[6] The owner who has retained title to the salved property and desires to have his vessel returned is subordinated to the lien of the salvors. 3A BENEDICT ON ADMIRALTY § 143; *Hamburg-American Line v. United States*, 168 F.2d 47 (1st Cir. 1948).

> organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

It is clear from this provision that judicial sales are to be conducted by an impartial third party, whether it is the marshal or some other person or organization retained by the marshal to perform tasks typically performed by the Marshals' Service. The rule clearly provides that the sale shall not by made by "a party in interest." The Fourth Circuit has clearly expanded this provision by affirming the trial court's decision to appoint the salvor as the sole marketing authority.[7]

The court's marketing ruling effectively negated the ownership interest of the Underwriters. It has long been the

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[7] In addition, it is the marshal's position that only a marshal's public auction conveys to the buyer a "clean" title, which extinguishes all maritime liens known and unknown. 5 BENEDICT ON ADMIRALTY § 39. Therefore, to ensure a maximum return for the gold, it should be sold at public auction.

purpose of salvage law to return lost property into the stream of commerce. *Ocean Services Towing and Salvage, Inc. v. Brown*, 810 F. Supp. 1258 (S.D. Fla. 1993). In the case of cargo, this property is best returned to the stream of commerce by way of the cargo owner, not judicial sale. It is unjust and inequitable that the Underwriters, having paid claims over a century and half ago, are now denied all rights of ownership in the cargo they insured.

The decision, which grants the salvor sole possession and control over the cargo and the exclusive right to market and sell the *res* is clearly a departure from salvage law and admiralty rules. The Underwriters are unaware of another salvage award which has so disenfranchised the lawful owner of property. The rationale for this incredible decision was based, in part, on the premise that the salvor could only receive maximum value for the *res* if it was marketed and sold by the salvor alone. This clearly should not be sufficient justification for abandoning established judicial

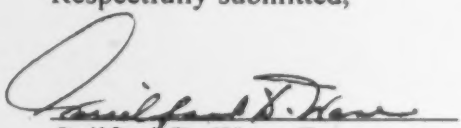
procedures under the Supplemental Admiralty Rules and centuries of precedents under salvage law.

CONCLUSION

The fact that the gold aboard the CENTRAL AMERICA may be the most valuable property ever subject to a salvage award is not justification for the court below to depart from the law of the case and traditional principles of salvage law. This Honorable Court must consider the precedent established by this expansion of maritime salvage law which deprives owners of lost cargo of the possession and enjoyment of salved property. This case also warrants the use of this Court's supervisory powers to avoid a third trial on the issue of ownership of this cargo by requiring the Fourth Circuit to affirm its first mandate. Therefore, petitioners respectfully request that this Court grant a writ of *certiorari* on the two questions presented. In the alternative, petitioners request that this Court summarily reverse the Fourth Circuit's ruling

in CADG II that the Underwriters be required to again prove ownership of the salved property.

Respectfully submitted,



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